Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

77-1700

WESTPORT TAXI SERVICE, INC., MICHAEL AND ANTHONY GILBERTIE,
Petitioners

v.

BROCK ADAMS, SECRETARY OF TRANSPORTATION, WESTPORT TRANSIT DISTRICT, PAUL R. GREEN, JOHN E. MEYERS, AND RICHARD BRADLEY,
Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT WITH APPENDIX

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QUESTIONS PRESENTED

A. Were Petitioners Entitled to Freedom from Public Competition Resulting from a Demonstration Project?

B. Did the Hearing Following the Court of Appeals Decision Render Petitioner's Claims Moot?

STATEMENT OF FACTS[1]

Respondent Westport Transit District (WTD) is a government entity formed by Westport, Connecticut in 1969 to organize, coordinate and provide mass transportation services in Westport. Conn. Gen. Stat. §7-273b. Its appointed directors are Paul R. Green, John E. Meyers and Richard Bradley. In April, 1975, the Transit District applied to the federal Urban Mass Transportation Administration ("UMTA") for a $25,000 grant to study the possibility of developing an integrated and coordinated transportation system for the community. The study had two immediate goals: first, to develop a plan for a complete transportation that would utilize and coordinate existing and potential transportation services; second, to design a demonstration project to implement and experiment with various aspects of the plan. Such studies are eligible for funding under 49 U.S.C. §1605 (c). On June 26, 1975, the Administrator of the UMTA, to whom the powers of the Secretary of Transportation under the Act have been delegated, 49 C.F.R. §1.51, approved the study grant. The study was conducted, and a demonstration project was proposed. Early in 1976, the Transit District applied for a grant of roughly $610,000 to implement the project. In July of 1976, the Administrator approved a grant for a two-year project. The basic question raised at the Court of

[1] The Court of Appeals succinctly stated the facts and this recitation is taken largely from that opinion. 571 F.2d. at 699-70.

Appeals was whether certain of the Act's procedural requirements had to be complied with prior to the Administrator's approval of the two-year implementation grant.

Westport Taxi Service, Inc. ("Westport Taxi") is a small taxi company owned by two brothers, Michael and Anthony Gilbertie. It operates under a certificate of public convenience and necessity from the Connecticut Public Utilities Control Authority ("PUCA"). Conn. Gen. Stat. §16-320. The type of service offered by Westport Taxi is known as "exclusive-ride" taxi service and is governed by PUCA regulation §16-319-15, which requires that the consent of the first person to hire a taxicab be obtained before the taxi may take on additional riders. Westport Taxi's "fleet" consists of five aging taxicabs; its financial condition is precarious.

The Transit District's demonstration project has provided several new types of services.[2] Principal among them will be a "shared-ride" taxi service provided with eleven new twelve-passenger vans. Other major elements of the project were special market services for groups such as the handicapped and elderly, transportation brokerage through which all transit and paratransit services in the area would be coordinated, and supplementary fixed route service. The services provided under the demonstration

[2] The transit district commenced operation of the project in April of 1977 following the district court's (Newman, J.) ruling denial of plaintiff's complaint for preliminary and permanent injunction relief.

grant are different from those provided by the plaintiff. No "premium ride" (single rider) service may be provided under the terms of the grant contract or by UMTA policy. The "shared-ride" service provided by WTD contemplates several riders being aboard in the vehicle before it can leave on its run. The plaintiffs, under a Connecticut Public Utility Control Authority regulation, were allowed to carry a second passenger only with the consent of the first.

As contemplated, the operation of the program has been subcontracted to a private paratransit company in accord with statutory and UMTA policy of permitting to the "maximum extent feasible" private participation. The two Westport Taxi operators were favored candidates for the contract and lengthy negotiations took place on this topic. None of WTD's many proposals for participation was accepted by Westport Taxi. The proposals included the operation of the new program as a joint partnership, an offer to Westport Taxi of a management fee, a dispatching fee and a loan to buy out Teddy's Taxi, its competitor, and a proposal that one company buy out the other. If the program ceased after the two-year demonstration period new equipment was to be leased to participants for a dollar a year. Nothing in any plan required the termination of either taxi business during the demonstration period. As the trial found:

> The Transit District not only held public hearings on the project, of which the plaintiffs were aware, but also made every effort to invite and

> encourage the plaintiffs to bid on participation in the project and negotiated with them at length on possible roles of them to play under the demonstration grant. Ultimately the plaintiffs declined to bid on the project. The fact that the negotiations were unsuccessful does not mean that there has been a statutory violation. All the statute (49 U.S.C. §§1602(e) and 1603) requires is encouragement of private participation "to the maximum extent feasible." It does not allow private transit operators to write their own ticket.

Following the district court adjudication, the demonstration project began. It has continued and is continuing to operate. Petitioner's competitor, Teddy's Taxi, opted to participate in the program and has provided the services contemplated by the grant.

When the Court of Appeals ruled that formal hearings and findings were required even for demonstration projects, a hearing was held on February 15, 1978 in which there was participation by petitioner's counsel. On February 27, UMTA approved the memorandum of its Associate Administrator for Transportation Management and Demonstrations and found, **inter alia:**

1. adequate opportunity was afforded for the presentation of views by all parties with a significant economic, social, or environmental interest, and fair consideration has been given to the preservation and enhance-

ment of the environment and to the interest of the community in which the project is located, and

2. no adverse environmental effect is likely to result from the project; and
3. the project to the maximum extent feasible provides for participation of mass transit companies. (See Appendix, attached hereto.)

On April 13, 1977 the court denied petitioner's requests for preliminary and permanent injunctive relief. Judgment was rendered on April 18, 1977 and petitioners appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeals heard argument on October 5, 1977 and rendered its decision on January 24, 1978, reversing the district court in part, affirming in part and remanding with instructions. Petitioner's motion for a rehearing was denied on February 28, 1978.

REASONS FOR DENYING WRIT

A. The Decision Below Followed An Unbroken Line Of Authority That Petitioners Had No Entitlement To Freedom From Public Competition And In Any Event There Has Been Statutory Compliance.

Both the district court and the court of appeals rejected petitioner's contention that injury to business resulting from the demonstration project services would amount to a taking. 571 F.2d at 700, n.3. It is It is well established, as petitioners for the first time recognize, Petition, p. 30, that there is no right to be

free from governmental competition. See *Tennessee Elec. Power v. T.V.A.*, 306 U.S. 118, 138-39 (1939). The argument is here based on a statutory right under 49 U.S.C. §1602 to be free from competition in absence of compliance with §1602(c). Compliance means hearing and findings.

The Second Circuit and the district court essentially reached the same result for different reasons. Judge Newman found that "the evidence presented by the parties shows that the statutory policy of providing private participation has been fully recognized and taken into account, but held hearings were not required for this *demonstration* project." More importantly he found that taking issue was clearly not a basis for injunctive relief. He pointed out that the remedy for any compensable taking was compensation, not injunction.

Judge Meskill approached the issue differently. He held that plaintiffs were not a "mass transportation company" within the meaning of §1602(e) and therefore were not entitled to a hearing. His reliance on the district court findings, the interpretations given to the definition of "mass transportation" by UMTA, the legislative history of the Act and the administrative actions under the Act, *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944) was an appropriate way to resolve the definitional problem and raises no issue worthy of this court's review.

Moreover, this issue is moot. Even if petitioner taxi company were held to be a mass transportation company within the Act, the only remedy would be

a 1602(e) hearing to determine if there were "participation of private companies to the maximum extent feasible." That hearing has been held.

Following the February, 1978, hearing that precise finding even though not required by the Act was made. (Appendix pp. 3a-4a) Indeed Judge Newman had found compliance with the statutory purpose even though he held that hearings were not required.

Thus, further hearings are neither needed nor useful. The demonstration project is scheduled to end in April, 1979.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Westport Transit District,
Paul R. Green
Richard Bradley
John E. Meyers, *Respondents by*

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed this day postage prepaid to Richard Silver and David Golub, 733 Summer Street, Stamford, and United States Attorney, 20 Orange Street, New Haven, and Glenn Wasserman, UMTA, 407th St. S. W., Washington, D. C.

By _____
J. Daniel Sagarin

APPENDIX

UNITED STATES GOVERNMENT
Memorandum

DEPARTMENT OF TRANSPORTATION
URBAN MASS TRANSPORTATION ADMINISTRATION

DATE: FEB 23 1978

In reply refer to:

SUBJECT: Amended Project Approval: Westport Connecticut CT-06-0007-01

FROM: Associate Administrator for Transportation Management and Demonstrations UMD-1

TO: Administrator UOA-1

I am submitting this amended approval memorandum pursuant to the recent decision by the Second Circuit Court of Appeals in the case titled Westport Taxi Service Inc. v. Brock Adams, Docket No. 77-6074 (2d Cir. decided Jan. 24, 1978). As you know, the Court held that there had been a failure to comply with the provisions of section 3(d) of the Act and sent the case back to the district court to enter an injunction against "any further expenditure of federal funds on the demonstration project...pending the amendment of the Transit District's application so as to contain the requisite certification [that public hearings have been held] and pending the approval of the amended application by the UMTA Administrator." To date, no injunction has been entered. However, we put an administrative hold on any further disbursement of funds under the Westport project pending action on this amended approval memorandum. To assist in your review of this amended approval menorandum, I have attached a copy of the original approval memorandum dated June 29, 1976.

Public Hearing:

Although a public hearing for the Westport project was held prior to the Project's original approval, no transcript of that hearing was made as necessitated by section 3(d). Thus, the grantee, Westport Transit District, held another public hearing on February 15, 1978, following fourteen days notice by publication in the newspaper. The public hearing conformed in all respects to the requirements of section 3(d), and the certificate required under that section together with the hearing transcript has been made a part of the application. A copy of the public hearing notices, hearing transcript, and certification are attached to this memorandum for your review.

Section 14:

When a public hearing under section 3(d) is held for a proposed project, some of the provisions of section 14 of the Urban Mass Transportation Act apply. Specifically, section 14(b) requires a review of each hearing transcript "to assure that an adequate opportunity was afforded for the presentation of views by all parties with a significant economic, social, or environmental interest, and that the project application includes a detailed statement on:

1. the environmental impact of the proposed project,
2. any adverse environmental effects which cannot be avoided should the proposal be implemented,
3. alternatives to the proposed project, and
4. any irreversible and irretrievable impact on the environment which may be involved in the proposed project should it be implemented."

The requirements of section 14(b) have clearly been met. The hearing transcript discloses that all parties with any economic, social, or environmental interest were afforded an opportunity to present their views. In addition, Westport Transit District submitted additional information on the environmental impact of the project. That additional information conforms in all respects with the requirements of section 14(b), and confirms our original judgment that no adverse environmental effect is likely to result from the project. In fact, the information submitted thus far shows that the project may have a favorable impact on the environment by reducing automobile usage.

One other matter under section 14 must be addressed. Section 14(c) of the Act requires that an "application for assistance under section 3" (emphasis added) shall not be approved unless written findings are made with respect to the adequacy of the public hearing and with respect to the environmental impact of the proposed project. Since the Westport project is a demonstration under section 6 and not a project under section 3, it would appear that section 14(c) need not be adhered to. However, in a footnote to the Second Circuit's opinion, the Court stated that the necessity of compliance with the Act's hearing requirement "triggers" the requirements of section 14(c).

The Chief Counsel's Office has informed us that they interpret this footnote to be a typographical error. That Office feels the Second Circuit intended to state that the Act's hearing requirment "triggers" the requirements of section 14(b), discussed above, and not section 14(c). Nevertheless, in light of the Court's footnote, we feel that it would be prudent in the case of this project to make the findings under section 14(c). Thus, I recommend that by signing this approval memorandum you find that:

1. adequate opportunity was afforded for the presentation of views by all parties with a significant economic, social, or environmental interest, and fair consideration has been given to the preservation and enhancement of the environment and to the interest of the community in which the project is located, and

2. no adverse environmental effect is likely to to result from the project.

Section 3(e):

As you know, the Second Circuit also held that section 6 demonstration projects are not exempt from the requirements of section 3(e) of the Act. However, the Court held that the plaintiff, Westport Taxi, was not entitled to the protections of section 3(e) since it is not a private mass transportation company within the meaning of the Act. Therefore, the Court did not specifically require that we make the findings that would normally be required under section 3(e). 1/

At the February 15, 1978 public hearing, a private mass transportation company, Cross Country Coach, appeared and voiced an objection to the Westport project. Cross Country Coach provides inter-city service between New Haven and Norwalk with stops in the cities in between, including Westport. Neither the service provided nor the equipment used by Cross Country Coach in its inter-city transportation is comparable to the service or equipment associated with the Westport demonstration project. While Cross Country does not operate closed door within Westport, its service is almost exclusively inter-city. Thus, the service provided by Westport is complementary to rather than competitive with or supplementary to the service provided by Cross Country.

In light of the appearance of Cross Country Coach at the public hearing, we feel it would be prudent to make the findings under section 3(e) in this amended approval memorandum. Thus, under subsection 3(e)(1), I recommend that by signing this approval memorandum you find that the Westport project is essential to a program, proposed or under active preparation,

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1/ Of course, even if Westport taxi were held to be a private mass transportation company there would be a clear basis for making the section 3(e) findings since one of the basic purposes of the project was to involve private enterprise and Westport Transit District went out of its way to attempt to involve Westport Taxi in the project.

for a unified or officially coordinated urban transportation system as part of the comprehensively planned development of the urban area. The basis for this finding is a favorable comment on the project by the Southwestern Regional Planning Agency, the local A-95 clearinghouse.

Under subsection 3(e)(2), I also recommend that you find that the project to the maximum extent feasible provides for the participation of private mass transportation companies. The basis for this finding is discussed above.

Because no franchises or property of an existing mass transportation company will be acquired, subsection 3(e)(3) is not applicable.

As noted in the original approval memorandum, the Secretary of Labor has certified the terms and conditions of the protective arrangements required under section 13(c) of the Act.

On the basis of the discussion in this memorandum and its attachments, I recommend that you approve the amended application.

Robert H. McManus

Approved: _____ Date: 27 Feb 1978
Richard S. Page

Attachments